BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

FILED
11-20-06
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In the Matter of the Application of San Diego Gas & Electric Company (U 902 G) and Southern California Gas Company (U 904 G) for Authority to Integrate Their Gas Transmission Rate, Establish Firm Access Rights, and Provide Off-System Gas Transportation Services	A.04-12-004 (Filed December 2, 2004) (Phase 2)

OPENING COMMENTS OF CLEARWATER PORT LLC ON THE PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE WONG AND THE ALTERNATE PROPOSED DECISION OF COMMISSIONER BROWN

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November 20, 2006

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I. Introduction and Summary of Recommendations

In accordance with Rule 14.3 of the Commission's Rules of Practice and Procedure, Clearwater Port LLC ("Clearwater") files these Opening Comments on the Proposed Decision of Administrative Law Judge ("ALJ") Wong and the Alternate Proposed Decision of Commissioner Brown. Because the Proposed Decision and the Alternate Proposed Decision are identical on all matters other than the peaking rate and because Clearwater's comments do not address the peaking rate, we refer collectively to the Proposed Decision and the Alternate Proposed Decision as the "Proposed Decision."

Pursuant to Rule 14.3(c) these comments focus on legal and factual errors in the Proposed Decision, and we do not reargue the position taken in our briefs. We do intend to respond to the arguments of several parties in a broader context (including the voluminous *ex*

parte communications that have flooded the Commission) when we address the Commission on November 28, 2006 in oral argument.

Clearwater appreciates the efforts of ALJ Wong and Commissioner Brown to address the complex and challenging issues in this proceeding and to arrive at a decision that is well-reasoned and balanced.

There are, however, two issues that need to be addressed in order for the decision to be implemented smoothly, quickly and fairly in 2007.

First, we believe it is legal error for the Proposed Decision to rely on dicta in another proceeding, D.06-09-039 in the gas quality proceeding (R.04-01-025), as authority for embracing a "first-come, first-served" approach to the allocation of firm access rights. The issue of allocating access rights was both outside the scope of R.04-01-025 and outside of the evidentiary record of that proceeding, and the Commission should not have opined on that issue in D.06-09-039. We submit that it is clear legal error for the Commission to base its findings in A.04-12-004 on dicta in an earlier decision addressing a matter outside the scope R.04-01-025.

Second, we believe it is legal error for the Commission to fail to determine when the Step 1 set aside for Funding Parties will vest. Clearwater continues to believe that an Open Season without preferential set-asides for Funding Parties is the most equitable approach because such an Open Season would be open, transparent, and non-discriminatory. However, if a preferential set-aside scheme is created at Otay Mesa, the Commission should, at a minimum, unambiguously define when set-asides vest and state unequivocally that the same vesting criteria apply for set-asides at *all* receipt points.

II. It Is Legal Error for the Commission to Rely on D.06-09-039 Dicta as Authority for Embracing a First-Come, First-Served Approach to the Allocation of Access Rights.

The Proposed Decision states that the Joint Proposal is attractive for two reasons. The first reason is that "the creation of a firm scheduling right for new or expanded capacity will provide assurances to gas suppliers and marketers that if they pay for the facilities on an incremental cost basis, that they will be able to move all (expansion capacity) or a substantial portion (displacement capacity) of their gas onto the SDG&E and SoCalGas transmission system."[1] In discussing this reason, the Proposed Decision cites language in D.06-09-039 as follows:

> We addressed a similar argument concerning how the costs of a receipt point expansion should be allocated in D.06-09-039. We stated that a "first-in-time cost allocation is a crude and, in some ways, unfair approach," but rejected the approach of soliciting interest in a capacity expansion and then allocating the costs equally among the interested parties. We stated that such an approach "could discourage investment," and that incremental expansion costs should be taken into account when siting facilities. (D.06-09-039, pages 76-80, 168-169, 174, FOF 38-39, 41, COL 14.)[2]

It is legal error for the Commission to rely upon this language in D.06-09-039 as authority for embracing a first-come, first-served approach in this proceeding. The Commission clearly should not have opined on this matter at all in R.04-01-025. The question of allocation of

[1] PD, pp. 69-70.

[2] In the same passage of the proposed decision, the Commission goes on to state that "We are concerned that if a first-in-time approach is not used that investment may be discouraged because a project sponsor may have to delay its schedule on account of a project that is second in line. The delay may cause the first project sponsor to look elsewhere to make its investment. In addition, there is no guarantee as to which gas supply projects will eventually be built. If we allow the second project to catch up to the first, there is no assurance that either project will be built." (PD at 70-17.) The proposed decision offers no citation for this concern that if a first-come approach is not used that some projects may be delayed, but it appears to be based upon speculation offered in the testimony of Dr. Pickel, wherein he suggested that the FAR Proposal "has the potential to hold up the most advanced projects while late or restructured projects attempt to catch up." (Ex. 53, p. 7) In contrast to Dr. Pickel's speculation however, SoCalGas/SDG&E has pointed out that certain of the CSUA/CWA "authorizations were signed quite closely in time to each other." (Opening Brief of San Diego Gas & Electric Company And Southern California Gas Company, pp. 97-98.) Thus, it is a factual error for the Commission to find that without a first-come, first-served approach there is a potential for delay that may cause any project to look elsewhere.

costs and preferences to new expansion was outside the scope of that proceeding. Ordering Paragraph 8 of D.04-09-022 directed that "Within three months of the issuance of this decision, SoCalGas and SDG&E shall file an application to request implementation of its firm access rights proposals."[3] Therefore, the instant application (A.04-12-004) is the forum designated for resolution of these questions, not R.04-01-025 where D.06-09-039 was issued. D.06-09-039 itself notes that the issues of access rights to the SoCalGas and SDG&E systems "are currently before the Commission in A.04-12-004."[4]

The issue of allocating costs and preferences to new expansion was not one of the questions identified for Phase II of R.04-01-025, as set forth in the Phase II Scoping Memo (February 28, 2005) or subsequent rulings on the scope and schedule for Phase II. While these rulings authorized parties to file testimony on infrastructure adequacy and slack capacity on the utilities' systems, the questions of allocating the cost of expansion at receipt points were reserved for A.04-12-004.[5] Therefore, D. 06-09-039 should not have addressed this issue.

Not only was the question of the allocation of the costs and preferences of new expansion outside the scope of R.04-01-025, this question was outside the record of that proceeding. The question was not raised during the evidentiary hearings in that proceeding.[6] Instead, it was raised for the first time in the Opening Brief of Woodside.[7] This brief was Woodside's sole participation in this phase of R.04-01-025. Woodside filed a belated petition to intervene in June 2005. Woodside did not participate in the evidentiary hearings, and Woodside did not file a

[3] D.04-09-022, Ordering Paragraph 8.

[4] D.06-09-039, p 83.

[5] Scoping Memo And Ruling Of The Assigned Commissioners For Phase II, And Notice Of Prehearing Conference, 2-28-05, pp. 4-6.

[6] Transcript volumes 7-10, R.04-01-025; December 12, 14-16, 2005.

[7] Opening Brief of Woodside Natural Gas Inc., 9-22-05

Reply Brief. Therefore, because the proposal was outside the scope of the proceeding and outside the evidentiary record, the Commission should have declined to address the matter in that proceeding.

To be clear, in D.06-09-039, the Commission *adopted nothing* with respect to first-come, first-served. Instead, the Commission's only action in D.06-09-039 was to affirmatively and unambiguously ***reject*** the Woodside proposal:

- In the Conclusions of Law in D.06-09-039, the Woodside proposal "is rejected."[8]
- In the Findings of Fact in D.06-09-039, "[w]e reject Woodside's proposal…."[9]
- In the text of D.06-09-039, "For these reasons, we will not adopt Woodside's proposal."[10]

The rejection of Woodside's proposal is clear in D.06-09-039, but it is also clear that the Commission went no further than to reject the proposal. Despite this clarity, the self-interested proponents of the first-come, first-served approach now seek to covert the affirmative and unambiguous rejection of Woodside's proposal into an adoption of a policy. The record does not support such regulatory alchemy, and thus reliance on D.06-09-039 to embrace the Joint Proposal or reject the FAR Proposal is legal error.

In our comments on the PD and APD in that proceeding, we respectfully submitted that it was premature and potentially prejudicial for the Commission to address the Woodside proposal in that proceeding.[11] D.06-09-039 failed to address Clearwater's comments on this aspect of the PD and APD.[12]

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[8] D.06-09-039, Conclusion of Law 14, p. 180.

[9] D.06-09-039, Finding of Fact 41, p. 175.

[10] D.06-09-039, p. 83.

[11] Comments of Clearwater Port LLC on the Proposed Decision of ALJ Weissman and Alternate Decision of Commissioner Peevey, August 28, 2006.

[12] D.06-09-039, p. 170.

Our warning that the premature consideration of this issue in D.06-09-039 could be potentially prejudicial was confirmed by the recent arguments of certain parties in this proceeding. In a written *ex parte* communication dated November 13, 2006, Coral argues that firm access rights are not needed because the Commission has already resolved this issue in D.06-09-039: "Furthermore, the Commission's September 2006 Phase II decision in R.04-01-025 (D.06-09-039) addresses the access priority of shippers that undertake expansions of receipt point capacity."[13]

The Commission has generally been careful not to address issues outside of the scope of the proceeding.[14] The Commission erred in addressing Woodside's arguments in D.06-09-039. The Commission should not now compound the error by citing this discussion as precedent. It would be legal error for the Commission to decide in this proceeding to embrace the Joint Proposal or elements thereof, on the grounds that the access priority of shippers has already been addressed in dicta in another proceeding where the issue was both outside the scope and outside the record of that earlier proceeding.

We have previously argued why we believe that the Joint Proposal should be rejected, and we do not intend to raise these arguments here. However, if the Commission intends to give consideration to any aspect of the Joint Proposal, it should do so on the basis of the record in this proceeding and not upon dicta in D.06-09-039.

[13] Attachment to Notice of *Ex Parte* Communications submitted by Coral Energy Resources, L.P., November 13, 2006. It should be noted that several entities who co-signed this letter are appearances of record, but have not previously participated in the FAR phase of this proceeding.

[14] D.94-12-026, n18; D.03-08-078, pp. 9-13.

III. It Is Legal Error for the Commission to Fail to Define When Preferential Set-Asides Will Vest.

A. If the Commission Elects to Impose a First-Come, First-Served Scheme, the Deferral of a Definition of "Vesting" is Legal Error.

The Proposed Decision "incorporate[s] many of the aspects of the Joint Proposal into the FAR system."[15] According to the Proposed Decision, "If a funding party builds new capacity or expands existing capacity on a displacement capacity basis at Otay Mesa, up to 700 MMcfd, and the funding party pays for it on an incremental cost basis, the funding party shall receive a Step 1 set aside at Otay Mesa in the open season for the capacity that the funding party paid for."[16]

Before one can implement a set-aside, one must define the criteria under which the right to a set-aside would vest. The Proposed Decision fails to do so.

Instead, the Proposed Decision states in Footnote 54 that "Since we are not adopting the Joint Proposal, there is no need to discuss when a scheduling right will vest under the Joint Proposal." This is clearly incorrect. By providing set-asides in Step 1 to "Funding Parties", the Proposed Decision is adopting the first-come, first-served aspect of the Joint Proposal. And if the Commission is adopting a first-come, first-served approach, it is vital that the Proposed Decision define the criteria for determining who is first.

The Proposed Decision recognizes that "a scheduling right may impact gas supply projects where two or more project sponsors seek to deliver the gas through the same receipt point. The project sponsor whose project is first in line would obtain a firm scheduling right to move its gas, which may discourage or make it more expensive for the second project sponsor to proceed with its project."[17] The same reasoning is equally applicable to the proposal to provide a

[15] PD, p. 72.

[16] *Id*., p. 73.

[17] PD, p. 70.

set-aside to a Funding Party at a receipt point. A preferential set-aside for a Funding Party will also impact gas supply projects where two or more project sponsors seek to deliver the gas through the same receipt point. The project sponsor whose project is first in line would obtain a firm access right to move its gas, which may discourage or make it more expensive for the second project sponsor to proceed with its project.

The record is also abundantly clear that a first-come, first-served approach to set asides for Funding Parties will also impact gas supply projects where two or more project sponsors seek to deliver gas through different receipt points. SoCalGas/SDG&E has stated that certain additional system upgrades or improvements will be required when two or more new receipt points are expanded or added to the SoCalGas/SDG&E system to address the potential cumulative effects of the two projects.[18] For example, if Sempra LNG and Coral are deemed to be first-in-time at the Otay Mesa receipt point, are they also first-in-time relative to projects at all other receipt points? And if so, would an entity such as SES, seeking to expand the Salt Works Station receipt point, now have to bear all of the common costs generated by the cumulative effects of the expansion of both Otay Mesa and Salt Works receipt points?

SoCalGas/SDG&E has said it can implement a first-come, first-served approach if we know who is first.[19] The Sempra Utilities note "While it appears from the testimony of the JP sponsors during hearings that priority in line is established by execution of a Collectible System Upgrade Agreement, or its predecessor the Collectible Work Authorization, the Commission should consider the fact that certain of these authorizations were signed quite closely in time to each other. The Commission must decide if it intends to allow tens of millions of dollars of capital investment or more to rest upon the date an agreement was signed if that date is close to

[18] Tr. 12, pp. 1958:12 – 1960:8, Ex. 40, Rivera – SES, p. 9:16-18.

[19] Tr. 7, p. 995:1-6 (Schwecke).

the date of another agreement, particularly since any first-come, first-served policy for FAR was not in effect at the time these agreements were signed."[20]

The Proposed Decision appears to defer the question of when set-aside rights would vest to a subsequent Advice Letter process. Clearwater respectfully submits that deferral of this issue would constitute legal error. The purpose of an Advice Letter is to implement a policy, not to make policy. The determination of when set-asides would vest involves policymaking in its most fundamental sense. This is not an area where SoCalGas/SDG&E should make discretionary determinations, especially where the decisions impact one of Sempra's own subsidiaries – Sempra LNG.

B. The Criteria for Vesting Set-Asides Must Be Clear, Consistent and Unbiased.

If the Commission wishes to consider merging the FAR Proposal and Joint Proposal by granting a set-aside in Step 1 of the Open Season to parties who are Funding Parties, the Commission must ensure that the allocation of these set-asides is based on criteria that are clear, consistent and unbiased. As the BHP witness stated "All receipt points should be treated equally. Transportation should be on a nondiscriminatory open access basis, with equal treatment for similarly situated shippers."[21]

To ensure consistency, if the Commission grants a preferential set-aside for Funding Parties at Otay Mesa, the Commission should both be explicit regarding the actions or events which qualified those parties for the preferential set-aside and be clear that the same criteria applied at Otay Mesa apply at other new or expanded receipt points.

[20] Opening Brief of San Diego Gas & Electric Company And Southern California Gas Company, pp. 97-98.

[21] Ex. 53, p. 6

Under cross-examination, witnesses for the Joint Proposal testified concerning the events that they believed qualified Coral and Sempra LNG as Funding Parties under the vague terms of the Joint Proposal. They testified that, under the terms of the Joint Proposal, their rights vested as Funding Parties when they executed a Collectible Work Authorization and transmitted to SDG&E a check in partial payment for the costs of interconnection.[22] The check was not in full payment for the estimated construction costs, but was an advance on the initial studies and related costs of a project to allow 600 mmcfd.[23]

The panel sponsoring the Joint Proposal was asked "for a simple, straightforward explanation of what a project at another receipt point has to do in order to have Scheduling Rights vest at another receipt point."[24] A member of the panel replied: "Enter into a collectible system upgrade agreement and pay the amount of money called for in that agreement."[25] The witness then qualified his response to indicate that it would also be sufficient to qualify as a Funding Party to have signed the predecessor agreement to the CSUA (the CWA) and to have advanced funds under that agreement.[26]

If the Commission chooses to create a set-aside of firm access rights for Coral or Sempra LNG at Otay Mesa because they were the first at Otay Mesa to sign an agreement with SoCalGas/SDG&E and advance the partial funding called for under that agreement, market participants at all other new receipt points should similarly qualify for a set-aside based on the same criteria.

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[22] Tr. 12, p.1985:5-15, Florio.

[23] *Id*., p. 1984:20-27.

[24] *Id*. 12, p. 1985:22-25

[25] *Id.,* p. 1985:22-28.

[26] *Id.,* p. 1986:1-7.

Clearwater continues to believe that an Open Season without preferential set-asides for shippers is the most equitable approach, but if a set-aside is created at Otay Mesa, the same criteria should apply for set-asides at other new receipt points.

IV. Conclusion

The FAR Proposal is a comprehensive set of rules designed to balance the interests of all shippers, marketers and end-use customers. Clearwater continues to believe that an Open Season without preferential set-asides for shippers is the most equitable approach, but if a set-aside is created the Proposed Decision should be modified (1) to ensure that such a proposal is based on the record in this proceeding and not based upon dicta in D.06-09-039, and (2) to define when set-asides will vest based on criteria that are clear, open, transparent and allows all LNG projects and all interconnection points to compete on an equal basis. No changes in the findings, conclusions or ordering paragraphs of the Proposed Decision are necessary to correct the aforementioned legal errors.

November 20, 2006

Respectfully submitted,

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By /s/

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PROOF OF SERVICE

I declare that:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and am not a party to the within action. My business address is ELLISON, SCHNEIDER & HARRIS; 2015 H Street; Sacramento, California 95814-3109; telephone (916) 447-2166.

On November 20, 2006, I served the attached *Opening Comments of Clearwater Port LLC on the Proposed Decision of Administrative Law Judge Wong and the Alternate Proposed Decision of Commissioner Brown* by electronic mail or, if no e-mail address was provided, by United States mail at Sacramento, California, addressed to each person shown on the attached service list.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on November 20, 2006, at Sacramento, California.

/s/
Ron O'Connor

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